

IN THE COURT OF APPEALS 12/29/95

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00443 COA

IN THE MATTER OF THE ESTATE OF CURTIS OAKS, DECEASED:

PEGGY ATTAWAY

APPELLANT

v.

FREDDIE H. OAKS, EXECUTOR OF THE ESTATE OF CURTIS OAKS

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JOHN C. ROSS, JR.

COURT FROM WHICH APPEALED: CHANCERY COURT OF UNION COUNTY

ATTORNEY FOR APPELLANT:

ROGER H. MCMILLIN, JR.

ATTORNEY FOR APPELLEE:

JOHN A. HATCHER

NATURE OF THE CASE: WILL AND ESTATE

TRIAL COURT DISPOSITION: DENIED RELIEF TO APPELLANT OF AN ACCOUNTING
AND REMOVAL OF APPELLEE AS EXECUTOR

BEFORE THOMAS, P.J., COLEMAN, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

STATEMENT OF THE FACTS

This case concerns the request by a beneficiary under a will for an accounting by the executor. Appellant, Peggy Attaway (hereinafter "Peggy"), is a named beneficiary in the will of her father, Curtis Oaks (hereinafter "Testator"). Her brother Freddie Oaks (hereinafter "Freddie") is the executor of the estate and also the son of Testator. Freddie and Peggy were each entitled under the will to one-half of all cash in the estate after satisfaction of claims, expenses and certain specific

bequests to Testator's grandchildren. Having never received any cash distribution from the estate, Peggy filed for an accounting. The court required that Freddie produce for inspection the estate's banking records which revealed distributions to Freddie totaling \$22,529.55 with no corresponding distribution to Peggy. Peggy then sought an order from the court compelling Freddie to replace those funds and his removal as executor, which was denied by the chancellor. Freddie was awarded an executor's fee and attorney's fees for his counsel. Feeling aggrieved, Peggy appeals to this Court seeking an accounting, removal of Freddie as executor, return of the disbursements made to Freddie, and disallowance of any and all fees (both executor fees and attorneys' fees). After careful consideration of the record, we find Peggy's issues to be meritorious and reverse and remand the judgment of the chancellor.

STANDARD OF REVIEW

We will "not disturb the findings of a Chancellor when supported by substantial evidence unless the Chancellor abused his discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied." *Will of McCaffrey v. Fortenberry*, 592 So. 2d 52, 60 (Miss. 1991).

ARGUMENT AND DISCUSSION OF THE LAW

The rights and duties of an executor are contained in Miss. Code Ann. § 91-7-47 (1972) which provides:

Every executor or administrator with the will annexed, who has qualified, shall have the right to the possession of all the personal estate of the deceased, unless otherwise directed in the will; and he shall take all proper steps to acquire possession of any part thereof that may be withheld from him, and *shall manage the same for the best interest of those concerned, consistently with the will, and according to the law*. He shall have the proper appraisements made, return true and complete inventories except as otherwise provided by law, shall collect all debts due the estate as speedily as may be, pay all debts that may be due from it which are properly probated and registered, so far as the means in his hands will allow, shall settle his accounts as often as the law may require, *pay all the legacies and bequests as far as the estate may be sufficient, and shall well and truly execute the will if the law permit*. He shall also have a right to the possession of the real estate so far as may be necessary to execute the will, and may have proper remedy therefor. In addition to the rights and duties contained in this section, he shall also have those rights, powers and remedies as set forth in Section 91-9-9, Mississippi Code of 1972.

Miss. Code Ann. § 91-7-47 (1972) (emphasis added). The duties of the executor are further explained by case law:

Duties of an executor have been outlined further in the case law of *Yeates v. Box*, 198 Miss. 602, 22 So. 2d 411 (1945), wherein this Court stated the executor's duties are "(1) to reduce to possession the personal assets of the testator; (2) to pay the testator's debts; (3) to pay legacies; and (4) to distribute the surplus to the parties entitled thereto." *Powers granted an executor are coextensive with the will and therein grounded. Ricks v. Johnson*, 134 Miss. 676, 99 So. 142 (1924); *Grant v. Spann*, 34 Miss. 294 (1857).

The duly appointed executor *shall carry out all of the provisions of the will that may be lawful. The will is the source and measure of the power of the executor. Ricks*, 99 So. at 146. And in determining the powers of executors, the basis for all construction of language within the will is to determine first the intention of the testator as gathered from the whole will. *Yeates v. Box*, 198 Miss. at 602, 22 So. 2d at 411.

One serving in the capacity of executor or administrator is an officer of the Court and *holds a fiduciary relationship to all parties having an interest in the estate. A trust arises from the appointment of the executor or administrator. Schreiner v. Cincinnati Altenheim*, 61 Ohio App. 344, 22 N.E.2d 587 (1939); 33 C.J.S., *Executors and Administrators*, § 3, p. 878 (1942).

Thus in answering questions of the powers, duties, and liabilities of executors, this Court applies the above Mississippi statutory and case law, as well as the expressed intent of the testamentary instrument itself.

In answering these questions this Court must establish a standard of care chargeable to an executor in evaluating charges of maladministration. It appears proper that since a trust and fiduciary relationship is established by these connections, this Court holds that the same standard of care applicable to a general trustee applies to an executor or administrator. This standard is expressed as follows:

Ordinary care, skill, and prudence are normally required of trustees in the performance of all their duties, unless the trust instrument provides otherwise. The rule is "that trustees are bound in the management of all the matters of the trust to *act in good faith* and employ such vigilance, sagacity, diligence and prudence as in general prudent [persons] of discretion and intelligence in like matters employ in their own affairs. The law does not hold a trustee, acting in accord with such rule, responsible for errors of judgment." "All that equity requires from trustees is common skill, common prudence, and common caution." []

Bogert, *Law of Trusts*, § 93 (5th ed. 1973). See also, Scott, *Scott on Trusts*, § 174 (3rd ed. 1967).

Estate of Hollaway v. Hollaway, 631 So. 2d 127, 133-34 (Miss. 1993) (emphasis added) (quoting *Harper v. Harper*, 492 So. 2d 189, 193-94 (Miss. 1986)). With these guidelines in mind, we now turn to the issues presented in the present case.

I. WAS THE BENEFICIARY'S REQUEST FOR AN ACCOUNTING ALREADY RES JUDICATA AT THE MARCH 28, 1994, HEARING ON HER MOTION BY VIRTUE OF AN EARLIER ORDER DATED JULY 6, 1993?

The chancellor appears to hold that the matter had been rendered "res judicata" by his earlier order of July 6, 1993. Peggy contends this is error because the July 6, 1993, order specifically reserved the question until a later date and a later bench ruling that supports her argument. Peggy contends that the matter was properly before the trial court at the March 28, 1994, hearing because to hold otherwise would require adjudication of her claims prior to the time that she was able to inspect the estate's financial records.

"[F]or res judicata to lie, a previous action must have conclusively decided the claim which is asserted in the second action." *Stewart v. Guaranty Bank & Trust Co.*, 596 So. 2d 870, 872 (Miss. 1992). "Res judicata only applies to questions actually litigated and determined by or essential to the judgment rendered in the former proceedings." *Trammell v. State*, 622 So. 2d 1257, 1261 (Miss. 1993). Here, we are presented with a situation in which the chancellor ruled that all other matters were res judicata while failing to actually adjudicate the issue of an accounting. We agree with Peggy in that she was improperly denied the opportunity to litigate the issue of an accounting.

II. DOES WAIVER OF ACCOUNTING BY THE TESTATOR IN HIS WILL PROHIBIT ALL INQUIRY INTO THE EXECUTOR'S HANDLING OF THE ESTATE ASSETS?

The Mississippi Supreme Court has stated that while a testator may waive the executor's duty to account, upon a charge of mismanagement, the chancery court may properly require an accounting. *Will of McCaffrey*, 592 So. 2d at 65 (citing *Harper v. Harper*, 491 So. 2d 189, 200 (Miss. 1986)). Clearly, the law provides for accountability of the executor even without the requirement of an accounting. The facts of this case indicate that the chancellor erred in failing to hold the executor accountable in his duty.

III. DOES THE FACT THAT AN EXECUTOR HAD A GENERAL POWER OF ATTORNEY FROM THE TESTATOR PRIOR TO HIS DEATH PROVIDE ANY ADDITIONAL AUTHORITY FOR DISBURSEMENTS MADE BY AN EXECUTOR AFTER THE TESTATOR'S DEATH WHEN SUCH DISBURSEMENTS ARE CONTRARY TO THE TERMS OF THE WILL?

Peggy also argues that the chancellor appeared to place reliance on the power of attorney given by Testator to Freddie. However, all transactions in question occurred after the death of Testator and

were undertaken in Freddie's capacity as executor. Additionally, the power of attorney ceased upon Testator's death. *See* Miss. Code Ann. § 87-3-13 (1972); *Smith v. H.C. Bailey Cos.*, 477 So. 2d 224, 235 (Miss. 1985) (citations omitted). The chancellor relies upon the power of attorney to provide the authority for Freddie's actions after Testator's death which is clearly error.

IV. WERE THE DISTRIBUTIONS MADE BY THE EXECUTOR TO AN ENTITY OWNED SOLELY BY HIM AND KNOWN AS "DOUBLE O FARMS" AUTHORIZED AS BEING IN FURTHERANCE OF THE BUSINESS OF THE TESTATOR'S ESTATE?

Freddie testified that "Double O Farms" was a tax shelter for himself and Testator. Freddie twice testified that at the time of Testator's death, Freddie was the sole owner of "Double O Farms." Additionally, Freddie did not account for assets of "Double O Farms" under Testator's estate, thus indicating it was not a part of the estate. The disbursement to "Double O Farms" appears on its face to be inappropriate in that the disbursement was essentially a disbursement to Freddie and not within the instructions of the will. Section 91-7-49 of the Mississippi Code provides that the directions of the will are to be followed. Additionally, "Mississippi Code Annotated § 91-7-253 (1972) provides that no executor or other fiduciary acting pursuant to the authority of the chancery court may borrow or use for his own benefit, directly or indirectly, any of the funds or property of the estate committed or entrusted to him by such court." *Kelly v. Shoemake*, 460 So. 2d 811, 824 (Miss. 1984).

V. CAN AN ORAL WISH ALLEGEDLY MADE BY THE TESTATOR PRIOR TO HIS DEATH THAT IS CONTRARY TO THE TERMS OF THE TESTATOR'S WILL OVERRIDE THE TERMS OF THE WILL?

Peggy argues that Freddie withdrew \$22,529.55 from the estate without any corresponding distribution to her. According to Peggy, Freddie justified his actions because the will waived an accounting and that his parents had both told him verbally before they died that they wanted him to have all the remaining cash. Peggy argues that such an oral bequest has no effect because the statutory formalities for a nuncupative bequest are not present.

Freddie made direct disbursements to himself totaling \$22,529.55 claiming these disbursements were made according to an oral will made by Testator. However, Freddie has failed to establish the requisites of an oral will. Testator left a valid written will and Freddie is bound by its terms as long as the law permits. Freddie simply cannot work outside the will based on some alleged oral modification(s) by Testator. *See* section 91-7-49 of the Mississippi Code (the directions of the will are to be followed).

VI. SHOULD AN EXECUTOR WHO VIOLATES HIS DUTIES AS EXECUTOR FOR HIS OWN PERSONAL GAINS BE DENIED ANY FEES FOR ACTING AS EXECUTOR?

Section 91-7-299 of the Mississippi Code provides for compensation of an executor. Peggy argues that it is unconscionable to allow Freddie to collect a fee for his service as executor when he materially violated his duties as executor. In *Schwander v. Rubel*, the Mississippi Supreme Court stated, "[u]nder the mandatory provisions of our statute, an executor or administrator is entitled to compensation within the limits of the statute *unless he has forfeited his right thereto by his*

misconduct or an abuse of his trust." *Schwander v. Rubel*, 221 Miss. 875, 75 So. 2d 45, 54 (1954) (emphasis added); *see also Scott v. Hollingsworth*, 487 So. 2d 811, 815 (Miss. 1986) ("*Absent a finding of maladministration*, this Court holds that this case be remanded for the chancellor to award compensation to the executor within the limits of § 91-7-299.") (emphasis added). In the present case, there is ample evidence of abuse of trust and misconduct by Freddie.

VII. DID THE CHANCELLOR ABUSE HIS DISCRETION IN AWARDING ATTORNEY'S FEES TO THE EXECUTOR OUT OF THE ESTATE WHEN THE BULK OF THE ATTORNEY'S DUTIES CONSISTED OF DEFENDING THE EXECUTOR'S CONTESTED PERSONAL CLAIM TO \$22,529.55 OF ESTATE ASSETS?

Peggy argues that most of the litigation in the estate involved competing claims between beneficiaries, one of whom also happened to be the executor. Thus, according to Peggy, Freddie should not have been allowed to charge the estate with attorney's fees for services rendered to the executor in protecting his own individual claims. Section 91-7-281 of the Mississippi Code allows for attorney's fees. Attorneys' fees incurred by the personal representative in the administration of the estate are not the debts of the estate, but his personal obligations for which he may be reimbursed if the court determines the services were necessary and rendered in good faith. *Clarksdale Hosp. v. Wallis*, 187 Miss. 834, 842, 193 So. 627, 628 (1940). However, [w]here the services were rendered for the sole benefit of an individual, or group of individuals, interested in the estate, as against the others interested, *such an allowance is unauthorized.* *Clarksdale Hosp.*, 187 Miss. at 842-43 (emphasis added); *accord Estate of Philyaw v. Johnson*, 514 So. 2d 1232, 1237 (Miss. 1987).

Furthermore,

In computing the cost of administration, no part of the expense of the litigation of the claims shall be charged against the estate because the general rule is that an executor cannot litigate the claims of one set of legatees against the others at the expense of the estate, 4 Am.Jur.2d Appeal and Error, Section 215, 216 (1962).

Banks v. Junk, 264 So. 2d 387, 394 (Miss. 1972). "It seems to be the general rule that attorneys' fees can only be allowed where the services rendered inure to the benefit of the estate." *McMurtray v. Deposit Guar. Bank & Trust Co.*, 184 So. 2d 395, 400 (Miss. 1966).

Therefore, we certainly would not authorize payment of an attorney's fee for that portion of the attorney's services devoted to the unsuccessful attempt of the executor to protect his personal claim against the claim of other persons entitled under the will to a portion of the funds in the estate. The routine services necessary for the administration of the estate, exclusive of services rendered on behalf of Freddie's own interest, are to be allowed on remand. It is unfortunate that the attorney for the estate did not recognize the conflict early in these proceedings and advise accordingly.

VIII. DID THE ACTIONS OF THE EXECUTOR CONSTITUTE SUFFICIENT BASIS TO REMOVE HIM FROM HIS OFFICE BASED ON MALFEASANCE OR, IN THE ALTERNATIVE, CONFLICT OF INTEREST?

Peggy argues that Freddie's misfeasance in office and his assertion of a personal claim against the estate destroyed his ability to serve in the fiduciary capacity as executor. Peggy argues that Freddie should have resigned immediately upon proper suggestion that he do so and his failure to resign constitutes grounds for removal.

Peggy argues that Freddie has materially violated his duties as executor and should be required to account for the funds and should also be required to replace the funds for proper distribution.

There can be no question that Freddie has a conflict of interest which necessitates his resignation as executor. *See Estate of Holloway v. Hawkins*, 515 So. 2d 1217, 1225 (Miss. 1987); *Chambers v. Smith*, 458 So. 2d 691, 693 (Miss. 1984) ("When an executor finds his own interest in conflict with those of the estate, the sanctity of the fiduciary relationship is invaded and he should immediately resign as executor.").

If Freddie refuses to resign, section 91-7-285 of the Mississippi Code provides the process for removal of an executor who is derelict in his duties.

CONCLUSION

Freddie Oaks, as executor of the estate, was under obligation to carry out the terms of the will as allowed under the law. The written will of Curtis Oaks, testator, clearly provided for equal division between Freddie and Peggy after satisfaction of claims, expenses and certain specific bequests. The record before us indicates that Freddie received disbursements totaling \$22,529.55 with no corresponding disbursements to Peggy. Freddie Oaks actions as executor did not measure up to the standard of prudence, caution and trust required of him as executor. It is the charge of the chancellor to oversee the handling of the estate. Neither Freddie nor the chancellor has any authority to rewrite Testator's will.

We remand this cause for proceedings on the issue of an accounting; we require that Freddie Oaks return the \$22,529.55 reflected in the estate records as disbursements made to him and proceedings to determine how disbursements are to be made under the terms of the will; we require proceedings to determine what portion, if any, of executor's fees Freddie is entitled to as a result of actual time spent in appropriate furtherance of the estate's business; we require that Freddie Oaks resign as executor or, if necessary, be removed therefrom by the chancellor and an appropriate replacement be appointed as executor of the estate of Curtis Oaks; we require that Freddie Oaks return all funds disbursed from the estate for the payment of executor and attorney's fees, for which he is personally liable; and we remand for further proceedings as necessary which are consistent with our opinion.

THE JUDGMENT OF THE CHANCERY COURT OF UNION COUNTY IS REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS ARE TAXED TO APPELLEE, FREDDIE OAKS, INDIVIDUALLY, AND NOT AS EXECUTOR, AND SHOULD NOT BE PAID BY THE ESTATE OF CURTIS OAKS.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING,

AND SOUTHWICK, JJ., CONCUR. McMILLIN, J., NOT PARTICIPATING.